No. 85-918

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

MOTHER GOOSE NURSERY SCHOOLS, INC.,
an Indiana Not-For-Profit Corporation

Petitioner

-v.-

THEODORE L. SENDAK, Individually and as
Attorney General of the State of Indiana

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana

DAVID MICHAEL WALLMAN
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6314

Attorneys for Respondent

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QUESTION PRESENTED

Whether the Attorney General of the State of Indiana should be immune from personal damages in federal court for exercising state statutory duties imposed upon him to review state contracts, and denying a public contract to a twice convicted income evader serving a probationary sentence at the time of contract submission.

TABLE OF CONTENTS

Page:

Table of Authorities iii

Statutory and Regulatory Provisions Involved 2

Statement of the Case 2

Reasons for Disallowance of the Writ 3

I. The Indiana Attorney General's Responsibilities in Reviewing State Contracts Meets the *Mitchell v. Forsyth* Test for the Award of Immunity 3

II. This Court's Recent Decision in *Cleavinger v. Saxner* Does Not Change Existing Precedent on Immunity or, More Importantly, the Seventh Circuit's Decision in This Case 5

III. Petitioner Presents at Best an Academic Issue not Warranting Review by This Court Since It is Apparent that Even a Qualified Immunity Shields Respondent and Prohibits Recovery by Petitioner 6

TABLE OF AUTHORITIES

Cases: *Page:*

Butz v. Economou, 438 U.S. 478 (1978) 3, 6

Citizen's Energy Coalition of Indiana v. Sendak, 457 F.Supp. 248 (S.D. Ind. 1978)..... 7

Citizens Energy Coalition of Indiana v. Sendak, 594 F.2ds 1158 (7th Cir. 1979) 5, 7

Cleavinger v. Saxner, ___ U.S. ___, no. 84-732 5

Davis v. Scherer, ___ U.S. ___, 104 S.Ct. 3012 (1984) 7

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 6, 7

Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct. 2806 (1985) 3

Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668 (7th Cir. 1985)..... 1, 4, 5

Sendak v. Citizens Energy Coalition, 444 U.S. 842, 100 S.Ct. 83 (1979) 5

Statutes:

IC 4-13-2-14 ..... 2, 3

Ind. Admin. Code (17-3-2-12)-B8 (Currently codified as 470 IAC 3-4-11 (1984))..... 2, 3

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Respondent, Theodore L. Sendak, the former Attorney General of the State of Indiana, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered August 14, 1985 in *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Indiana General Assembly has posited contract review with the Indiana Attorney General since at least 1947. IC 4-13-2-14 reads in pertinent part:

> All contracts and leases shall be approved as to form and legality by the attorney general. The attorney general or a deputy designated by him shall approve any contract or lease submitted to him under this chapter unless he finds that it does not meet the conditions of this chapter and shall detail in writing to the administrative body or chief executive officer of the agency or department involved the specific respects in which the proposed agreement fails to meet the requirements of law.

Regulations having the force and effect of statutory law have been enacted in regard to the licensing and operation of day care centers. Ind. Admin. Code (17-3-2-12)-B8, currently codified at 470 IAC 3-4-11 (1984), provides in pertinent part:

> (a) Each member of the staff [of an approved provider] shall be a competent and reliable person of good moral character and reputation who is mentally, physically and emotionally able to assume assigned responsibility for group care of children, or for the operation and maintenance of the child-care institution.

STATEMENT OF THE CASE

Anthony J. Cifaldi was, at the time of the incidents pertinent to this case, the owner and chief operating officer of Mother Goose Nursery Schools Incorporated (hereafter Mother Goose). Mother Goose had received annual state contracts for the provision of day care services to eligible children. Attorney General Sendak refused to approve the contract for state fiscal year 1979 (July 1, 1978 to June 30, 1979) when he discovered that Cifaldi had been twice

convicted of income tax evasion and was serving a probationary sentence at the time of contract submission. Pursuant to IC 4-13-2-14, Attorney General Sendak communicated his rejection of the contract to Governor Bowen by letter dated September 26, 1978. The rejection was based on failure of Anthony Cifaldi to be a "competent and reliable person of good moral character and reputation" as required by Ind. Admin. Code (17-3-2-12)-B8.

As a result of this rejection, Petitioner commenced this litigation. At no time did Petitioner seek redress under the numerous remedies available under state law, see *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 at 674 to 675, (7th Cir. 1985). At the time of the contract rejection, there was no case law construction of the Attorney General's contract review obligations under IC 4-13-2-14 by a state or federal court of record.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

The Indiana Attorney General's Responsibilities in Reviewing State Contracts Meets the *Mitchell v. Forsyth* Test for the Award of Immunity

The true essence of Petitioner's claim is that the Seventh Circuit misapplied this Court's decision on *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985). *Mitchell* establishes, if not reaffirms, a three (3) part test for the application of absolute or quasi-judicial immunity. The Seventh Circuit carefully applied both *Mitchell* and *Butz v. Economou*, 438 U.S. 478 (1978):

> There are, of course, some obvious differences between the role of the Attorney General as prosecutor and the Indiana Attorney General's role in reviewing proposed contracts with the state for correct "form and legality." But the similarities between the two are sufficient to make them analogous for immunity

> purposes. In both instances the state has vested the Attorney General with the responsibility to review the facts of a given case- in one, allegedly criminal conduct, and in the other, a proposed contractual relationship- and determine whether the conduct is legal. Both decisions require that the Attorney General use his legal expertise and practical experience to determine whether the proposed conduct is in accordance with the law. In fact, in the contract review area, the Attorney General's conduct is even more "judicial" than in the Attorney General's role as prosecutor. As prosecutor, he is vested with broad discretion to bring a suit, which discretion is seldom questioned by the court, especially if the Attorney General decides not to pursue the case further. Moreover, as a prosecutor, the Attorney General in a sense is merely initiating the formal judicial process. In his role as contract reviewer, he has no discretion in determining what cases are considered formally, much as a judge has little control over which cases are prosecuted. Moreover, rather than starting the prosecution, the Attorney General is vested with "ultimate" decision on legality.
>
> *Mother Goose*, *supra* 770 F.2d at 673.

In addition, the Seventh Circuit correctly determined that reviewing contracts for "form and legality" was far from a woodenly ministerial act, *Mother Goose*, *supra* 770 F.2d at 674.

A fair reading of *Mitchell* demonstrates that the key failure of Attorney General Mitchell in maintaining immunity for his somewhat nebulous theory of "national security" was the lack of safeguards or checks on his action, *Mitchell*, 105 S.Ct. at 2814. As the Seventh Circuit determined in the case at bar, state judicial remedies abound, *Mother Goose*, 770 F.2d at 674 to 675.

This Court's opinion in *Mitchell* cannot logically be read to modify the test for immunity repeated by this Court in *Butz* and applied throughout the federal judiciary, a

position tacitly acknowledged by the Seventh Circuit in the instant case.[1]

The Seventh Circuit's determination that contract review under Indiana state law properly met all tests for quasi-judicial immunity established by this Court and developed throughout the federal judiciary.

II.

This Court's Recent Decision in *Cleavinger v. Saxner* Does Not Change Existing Precedent on Immunity or, More Importantly, the Seventh Circuit's Decision in This Case

This Court's decision in *Cleavinger v. Saxner*, ____ U.S. ____, no. 84-732, issued December 10, 1985, cannot fairly be read to change the standard tests for granting or denying immunity to governmental officials. All *Cleavinger* did in reality was to apply existing tests to in-house correctional personnel serving on part time ad hoc discipline committees.

The distinguishing features between *Cleavinger* and the instant case are readily apparent; Attorney General contract review does not involve disposition by unsophisticated staff passing on persons or entities personally known to the Attorney General. Neither, as the Seventh Circuit found, are remedies non-existent or meaningless. See *Mother Goose*, 770 F.2d at 674 to 675.

To equate a state elected official's statutory obligations to apply the existing body of contract law to a specific

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[1]In addition to the numerous case citations relied upon by the Seventh Circuit for the immunity proposition, Respondent would highlight *Citizens Energy Coalition v. Sendak*, 594 F.2d 1158 at 1162 (7th Cir. 1979), where the Seventh Circuit found Attorney General contract review to be quasi-judicial. This Court denied certiorari, *Sendak v. Citizens Energy Coalition*, 444 U.S. 842, 100 S.Ct. 83 (1979).

proposed contract with prison employees' marginal efforts to discipline inmates personally known to them is both unnecessary under existing case law, including *Cleavinger*, and uncalled for on the facts of this case.[2]

In any event, *Cleavinger* distilled and applied the set of factors for absolute immunity established in *Butz, supra.* Stated succinctly, there is an obvious need for the Attorney General to perform contract review without harrasment or intimidation; state law judicial remedies abound for the correction of errors and the award of damages; and, perhaps most importantly, positing public contract approval with some state official, in this case the Attorney General, is about the only viable means to avoid undue political influence in an area chronically susceptible to the worst traditions of Tammany Hall.

Cleavinger does not change the result reached by the Seventh Circuit in the case at bar.

III.

Petitioner Presents at Best an Academic Issue not Warranting Review by This Court Since It is Apparent that Even a Qualified Immunity Shields Respondent and Prohibits Recovery by Petitioner.

Petitioner' s effort to style this case as some vitally important and incorrect extension of quasi-judicial immunity tacitly assumes that he can recover if he defeats the immunity granted by the Seventh Circuit. This position is simply incorrect.

The *only* reported case from any court construing the Indiana Attorney General's contract review authority,

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[2]For whatever reasons, the petitioners in *Cleavinger* did not appeal the finding that they violated "clearly established law" under the test established in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). As more fully developed in the following argument, Respondent in the instant case contends simply that he is immune under the terms of any available test.

Citizen's Energy Coalition of Indiana v. Sendak, 457 F.Supp. 248 (S.D.Ind. 1978), came down some three (3) weeks *after* Respondent Sendak communicated his rejection of Petitioner's contract to Governor Bowen. The District Court's opinion of first impression was appealed to the Seventh Circuit with a determination rendered some six (6) months after contract rejection, *Citizens Energy Coalition of Indiana v. Sendak*, 594 F.2d 1158 (7th Cir. 1979).

This Court has held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known", *Harlow v. Fitzgerald*, 457 U.S. 800 at 819, 102 S.Ct. 2727 at 2738 (1982). To hold Respondent personally liable in damages, as the District Court did in the instant case, for rejecting the contract is to hold the Respondent responsible for failing to predict a federal court's initial construction of an unconstrued state statute.[3]

Since a proper application of *Harlow* and its progeny, *Davis v. Scherer*, ___ U.S. ___, 104 S.Ct. 3012 (1984), for example, results in no recovery by Petitioner, consideration by this Court of the type of immunity to be granted presents an academic exercise only.

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[3]The questions of pre- or post-deprivation administrative remedies and the correctness of rejecting the contract were not considered by the Seventh Circuit since Petitioner did not appeal the denial of injunctive relief, *Mother Goose v. Sendak*, 770 F.2d at 674, fn. 5, and 675, fn. 6. Neither does Petitioner raise them here.

CONCLUSION

For the foregoing reasons, Respondent, former Indiana Attorney General Sendak, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

David Michael Wallman
Deputy Attorney General